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WEST V. GIBSON

**WEST V. GIBSON¹: FEDERAL EMPLOYEES WIN THE BATTLE, BUT ULTIMATELY LOSE
THE WAR FOR COMPENSATORY DAMAGES UNDER TITLE VII**

*Whatever the EEOC's original mission, and whatever the original hope, today the agency is clearly a failure, serving . . . as little more than an administrative obstacle to resolution of claims*²

I. INTRODUCTION

In 1991, Congress passed the Civil Rights Act of 1991 (hereinafter 1991 CRA),³ which allows victims of intentional employment discrimination to recover compensatory and, in some cases, punitive damages.⁴ However, the 1991 CRA did not clarify whether the Equal Employment Opportunity Commission (hereinafter EEOC)⁵ could require the federal government to pay those damages to federal employees who were successful in the administrative process.⁶ This year, in *West v. Gibson*, the Supreme

¹ 527 U.S. 119 S. Ct. 1906 (1999).

² Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 64 (1996).

³ Pub. L. No. 102-166, 105 Stat. 1071-1100. The 1991 Act amends five statutes: 1. Title VII of the Civil Rights Act of 1964; 2. the Americans with Disabilities Act of 1990; 3. the Age Discrimination in Employment Act of 1967; 4. the Civil Rights Act of 1866; and 5. the Civil Rights Attorney's Awards Act of 1976. *E.g.*, Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 54 (1993). The portions of the Civil Rights Act of 1991 at issue in *West v. Gibson* are codified at 42 U.S.C. §1981a(a)-(d) (1999).

⁴ 42 U.S.C. §1981a(a)(1) (1999). However, government employees may not recover punitive damages from the federal government. 42 U.S.C. §1981a(b)(1) (1999). *See infra* notes 14-28 and accompanying text for a discussion of the Civil Rights Act of 1991.

⁵ The EEOC was created in 1964, under the provisions of Title VII of the Civil Rights Act of 1964, described *infra* note 14. *E.g.*, Mary Kathryn Lynch, *The Equal Employment Opportunity Commission: Comments on the Agency and its Role in Employment Discrimination Law*, 20 GA. J. INT'L & COMP. L. 89, 92 (1987). Initially, the EEOC had no enforcement powers; it could only investigate discrimination claims and encourage voluntary conciliation between the parties. *Id.* at 93. Starting in 1972, the EEOC's authority expanded to allow it to actually litigate Title VII claims and, subsequently, claims under the Age Discrimination in Employment Act, and the Equal Pay Act. *Id.* at 94.

⁶ Because the language of 42 U.S.C. §1981a, which contains the new damages provisions, is not clear on this point, there has been disagreement in two circuits. *E.g.*, *Crawford v. Babbitt*, 148 F.3d 1318 (11th Cir. 1998), *vacated by* *Babbitt v. Crawford*, 119 S. Ct. 2263 (1999); *Fitzgerald v. Secretary, U.S. Dep't of Veterans Affairs*, 121 F.3d 203 (5th Cir. 1997). *Crawford* and *Fitzgerald* are discussed *infra* notes 41-49 and accompanying text. The issue of whether the EEOC has the power to award these damages is especially critical for federal employees because their only cause of action for discrimination lies under Title VII, and because they are

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Court held that the EEOC can indeed order government agencies to compensate federal sector complainants for any physical and emotional injuries they suffer as a result of intentional workplace discrimination.⁷

At first glance, the Court's allocation of broader adjudicatory powers to the EEOC seems like an advantageous decision for employment discrimination plaintiffs,⁸ especially those in the federal sector who must rely on the EEOC administrative process to adjudicate their claims.⁹ However, upon closer analysis, it is not clear whether federal complainants navigating the EEOC system will actually reap the advantages of the compensatory damages provisions of the 1991 Civil Rights Act and the EEOC's newfound ability to award them.¹⁰

This Note analyzes the Supreme Court's decision in *West v. Gibson* against the backdrop of the new damages provisions of the Civil Rights Act of 1991 and the EEOC system for federal employees. Section II provides a brief legislative history of the 1991 CRA, outlines the EEOC complaint procedure specifically tailored to federal sector employees, and describes the cases leading up to *West v. Gibson*.¹¹ Section III

obligated to use the EEOC administrative process almost exclusively to address their complaints. *Brown v. General Servs. Admin.*, 425 U.S. 820, 832-33 (1976) ("The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief."). See *infra* notes 29-40 and accompanying text for a discussion of the administrative process for federal employees.

⁷ *West v. Gibson*, 119 S. Ct. 1906, 1912 (1999). For an explanation of the EEOC's treatment of compensatory damages, see *infra* notes 100-124 and accompanying text.

⁸ In the late 1980s, the Supreme Court issued a series of opinions that severely curtailed employment plaintiffs' rights to recover in discrimination suits. *E.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that §1981 applied only to the making of employment contracts, not to discriminatory actions that may take place during the performance of them). One of Congress' purposes in enacting the 1991 Civil Rights Act was to undo the effects of those decisions. H. REP. NO. 102-40(I), at 14 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 552. See also *infra* notes 23-28 and accompanying text for a discussion of the damages provisions of the 1991 CRA. The Supreme Court decisions themselves are discussed in more detail *infra* note 17.

⁹ Government employees' claims are processed through a lengthy administrative process initially within the offending agency, and subsequently through the EEOC if the complainant chooses to appeal the agency decision. See generally ABIGAIL MODJESKA, EMPLOYMENT DISCRIMINATION LAW §§ 9.02-9.05 (3d ed. 1999); see also *infra* notes 29-40 and accompanying text. In the federal sector, the EEOC's determinations are binding on the agency unless the complainant seeks *de novo* review in federal court. *Gibson v. Brown*, 137 F.3d 992, 993 (7th Cir. 1998), *vacated sub nom.* *West v. Gibson*, 119 S. Ct. 1906 (1999).

¹⁰ See *infra* notes 114-130 and accompanying text.

¹¹ See *infra* notes 14-49 and accompanying text.

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describes the Supreme Court's reasoning in *Gibson*,¹² and Section IV analyzes the decision, concluding that, given the realities of congressional compromise and systemic constraints, the Supreme Court's decision actually does little to benefit federal employment discriminatees in the administrative process, at least in terms of allowing them to recover compensatory damages.¹³

II. BACKGROUND

A. *Title VII and the Civil Rights Act of 1991: Adding Bite to Title VII's Bark*

1. Brief History of the Civil Rights Act of 1991

Congress enacted Title VII of the Civil Rights Act of 1964¹⁴ in order to promote a discrimination-free workplace in both the public and private sectors.¹⁵ The federal courts' initial liberal construction of Title VII¹⁶ eventually gave way, in the late

¹² See *infra* notes 50-94 and accompanying text.

¹³ See *infra* notes 95-130 and accompanying text.

¹⁴ Title VII is codified at 42 U.S.C. §§2000e-1 to 2000e-17 (1995). Title VII protects federal sector employees by providing that these employees “shall be made free from any discrimination based on race, color, religion, sex, or national origin.” 42 U.S.C. §2000e-16(a) (1999). See generally Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375 (1995) (examining the efficacy of Title VII over the past thirty years, including contemporary use of Title VII and its impact on the labor market).

¹⁵ E.g., Michael Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 391-92 (1993) (“Title VII protects against discrimination based on race, color, sex, or national origin in virtually every aspect of the employment relationship.”). Congress did not extend Title VII to cover federal employees until 1972, when it enacted the Equal Employment Opportunity Commission Act of 1972, Pub. L. No. 92-261, 86 Stat. 11. Prior to the enactment of Title VII, workplace discriminatees had to rely on the Civil Rights Act of 1866, which is codified at 42 U.S.C. §1981 and which proscribes racial discrimination in public and private contractual relationships. E.g., Caryn Leslie Lilling, Note, *The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America's Civil Rights*, 9 HOFSTRA LAB. L.J. 215, 247 (1991). Section 1981 provides, in pertinent part, that “[a]ll persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .” 42 U.S.C. §1981 (1999).

¹⁶ Title VII analysis has yielded two theories of discrimination: disparate impact and disparate treatment. E.g., Lilling, *supra* note 15, at 222. Disparate treatment entails treating individuals differently based on their race, sex, religion, etc. *Id.* at 224. The Supreme Court fashioned the

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1980s and early 1990s, to more restrictive views of employees' rights in the workplace.¹⁷ The Court's striking change in approach at that time, combined with Title VII's limited damages provisions,¹⁸ seriously threatened Title VII and its goal of eliminating workplace discrimination by making it increasingly more difficult for employment discriminatees to bring successful claims.¹⁹ For this reason, Congress set out to counteract these decisions via legislation designed to restore balance to civil rights laws.²⁰ After a firestorm of controversy and President Bush's veto of Congress'

disparate impact theory in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where it unanimously held that Title VII forbids employment practices that have a discriminatory effect even if they were adopted without discriminatory intent. Under *Griggs* and its progeny, the plaintiff must demonstrate that a given employment practice has an adverse impact on job applicants; the burden then shifts to the employer to prove that the practice in question is justified by some business necessity. Lilling, *supra* note 15, at 224. Then, the employee must show that the employer could accomplish the same result using non-discriminatory processes. *Id.*

¹⁷ One purpose of the Civil Rights Act of 1991 was to respond to a series of Supreme Court decisions that severely curtailed plaintiffs' rights to a discrimination-free workplace, the most significant of which are as follows: *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (limiting *Griggs* by holding that an employer must only produce evidence of a business justification after a plaintiff demonstrates disparate impact and that the burden of persuasion remains with the plaintiff-employee); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that Section 1981 prohibits racial discrimination only in the initial formation of a contract; Section 1981 does not apply to discriminatory conduct that arises during the performance of an employment contract); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that, when a plaintiff shows that discriminatory animus motivated an employment decision, an employer could avoid liability by showing that it would have made the same decision for other, non-discriminatory, reasons). *E.g.*, Livingston, *supra* note 3, at 54-55.

¹⁸ Prior to the 1991 Act, Title VII permitted only the damages contained in the text of Title VII itself: enjoining the respondent-employer from engaging in a discriminatory employment practice; reinstatement or hiring of employees, with or without back pay; or "any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g)(1) (1999).

¹⁹ Cf. Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 20-30 (1994) (providing an extensive analysis of the legislative history of the 1991 CRA, including the politics and policies behind it). When the 1989 decisions came down, see *supra* note 17, there was much stir among civil rights groups, lobbyists, and members of Congress. Govan, *supra* at 23. For example, Senator Howard Metzenbaum (D-Ohio) characterized these decisions as a "stunning example of the Court's retreat from equal opportunity." *Id.* at 23-24.

²⁰ Govan, *supra* note 19, at 25, 31. Immediately after the 1989 Supreme Court term, Congressmen Augustus Hawkins and Edward Kennedy led an effort to draft legislation to overturn the adverse civil rights decisions. *Id.* at 31. These decisions are listed *supra* note 17. Another purpose of enacting new legislation was to equalize Title VII and Section 1981 so

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initial proposal (the Civil Rights Act of 1990),²¹ the Civil Rights Act of 1991 was signed into law on November 21, 1991.²²

2. The Damages Provisions of the 1991 CRA

The 1991 CRA represents the ultimate compromise between Congress and the Bush administration.²³ Although the Act responded to the Supreme Court's civil rights decisions and expanded remedies for victims of discrimination, it also catered to employers' fears of skyrocketing costs of litigation.²⁴ To be eligible for compensatory damages, a complainant must be a victim of intentional discrimination²⁵ and he must not be able to recover under 42 U.S.C. §1981.²⁶ As part of the compromise, both

that victims of other types of discrimination would enjoy the same rights and remedies as racial discriminatees had under Section 1981. Govan, *supra* note 19, at 36. Since expanding Section 1981 to include other groups was not a desirable outcome, the legislators involved sought instead to add compensatory damages, punitive damages, and jury trials to the Title VII remedial scheme. *Id.*

²¹ Lawmakers and commentators who opposed civil rights reform were very critical of the Civil Rights Act of 1990. *See generally* Govan, *supra* note 19, at 155-167. For example, in his veto message to Congress, President Bush concluded that the net result of the 1990 Act would be to "introduce the destructive force of quotas into our Nation's employment system" and to "create powerful incentives for employers to adopt hiring and promotion quotas." 136 CONG. REC. §16457-02 (daily ed. Oct. 22, 1990). *See also* Zachary D. Fasman, *Practical Problems of the Civil Rights Act*, WASH. POST, July 23, 1990, at A11 (criticizing the 1990 Act as leading to quotas, increased litigation, and skyrocketing expenses related to discrimination claims).

²² *See generally* Statement of President George Bush Upon Signing S. 1745, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 25, 1991), reprinted in 1991 U.S.C.C.A.N. 549, 768-69.

²³ Maj. Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 4 (1993) ("The Civil Rights Act of 1991 was an election-year political compromise between a beleaguered Republican White House and a Democratically controlled Congress."). "Compromise, however, . . . is often an ineffective solution." Lilling, *supra* note 15, at 256.

²⁴ *See, e.g.*, Douglas M. Staudmeister, *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U. L. REV. 189, 203 (1996).

²⁵ Victims of disparate impact discrimination may not recover under the compensatory damage provisions. 42 U.S.C. §1981a(a)(1) (1999). For a discussion of disparate impact discrimination, see *supra* note 16.

²⁶ 42 U.S.C. § 1981a(a)(1) (1999). The damages provision provides, in pertinent part, "provided that the complaining party cannot recover under Section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964,

compensatory and punitive damages are capped according to the size of the employer.²⁷

The 1991 CRA also provides that a complainant seeking compensatory (or punitive) damages may request a jury trial, and that, during the trial, the judge must not instruct the jury on the caps on damages.²⁸

B. Enforcing Title VII in the Federal Sector

Federal employees²⁹ are required to enforce their rights under Title VII via the Merit Systems Protection Board³⁰ or the EEOC.³¹ A federal employee must first

from the respondent.” 42 U.S.C. §1981a(a)(1) (1999).

²⁷ The 1991 CRA caps damages as follows:

The sum of the amount of compensatory damages awarded under this section . . . and the amount of punitive damages . . . shall not exceed for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding year, \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . , \$100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees . . . , \$200,000; and

(D) in the case of a respondent who has more than 500 employees, . . . , \$300,000.

42 U.S.C. §1981a(b)(3) (1999).

²⁸ The 1991 CRA jury trial provision provides:

If a complaining party seeks compensatory or punitive damages under this section—(1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitation described in subsection (b)(3) of this section.

42 U.S.C. §1981a(c) (1999).

²⁹ The United States government is the largest employer in the United States, employing 2.5% of the nation's civilian workforce, which is over 2.98 million people. Dennis V. Damp, *Introduction to Government Service* (visited 1-12-00), <<http://www.iccweb.com/federal/intro.htm>>. Almost 75% of all federal health care workers are employed by the Department of Veterans Affairs. *Id.* The following federal employees are covered by Title VII: those in competitive service positions (including those in positions in the legislative and judicial branches); employees of executive agencies (as defined in 5 U.S.C. § 105); employees of the United States Postal Service; civilian employees of military departments (as defined in 5 U.S.C. §102); and employees of the Library of Congress. 42 U.S.C. § 2000e-16(a) (1999).

³⁰ The Merit Systems Protection Board was created by the Civil Service Reform Act of 1978 (5 U.S.C. § 7171 *et seq.*) and has coexisting authority to enforce statutes in some circumstances and to issue its own set of regulations, which are codified at 5 C.F.R. §1201. MODIESKA, *supra* note 9, at § 9.02.

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address his complaints within the agency for which he works.³² The agency must then investigate the claim³³ and provide the employee with the results of the investigation.³⁴ At the end of the investigation, the agency may offer the employee a settlement offer, typically referred to as an “offer for full relief.”³⁵ If the employee rejects this offer, the agency must dismiss the complaint.³⁶

At that point, the employee may either appeal to the EEOC, or she may file a claim in federal district court.³⁷ If the employee chooses the EEOC appeal, the Office of Federal Operations, on behalf of the EEOC, must issue a written decision.³⁸ If the

³¹ MODJESKA, *supra* note 9, at § 9.02. EEOC regulations regarding the federal sector enforcement process are codified at Federal Sector Equal Opportunity, 29 C.F.R. §1614 (1998). In July of 1999, the EEOC issued a series of new regulations relating to the federal sector, the purpose of which was to improve the federal sector program. *See Questions and Answers: Final Federal Sector Complaint Processing Regulations 29 C.F.R. Part 1614* (last modified July 12, 1999) <<http://www.eeoc.gov/federal/1614-qanda.html>>. These changes include the expansion of deadlines, the elimination of provisions allowing agencies to revise administrative judges' decisions, and the elimination of provisions allowing agencies to dismiss complaints if an employee fails to accept the agency's offer relief. *Id.* These provisions went into effect on November 12, 1999. *Id.* The procedures described *supra* notes 29-30, *infra* notes 32-40 and accompanying text reflect the procedures that were in place prior to November 12, 1999.

³² 29 C.F.R. §1614.105 (1999).

³³ 29 C.F.R. §1614.108(a) (1999).

³⁴ 29 C.F.R. §1614.108(f) (1999).

³⁵ 29 C.F.R. §1614.501(a) (1999). Full relief includes, but is not limited to, a new job placement with back pay and interest, discontinuation of any discriminatory practices, and an opportunity to participate in employee benefits denied because of discrimination. 29 C.F.R. §1614.501(a), (c) (1999). The Supreme Court defined “full relief” as relief that would have been available to a party if he/she had prevailed on every issue in the complaint. *Jackson v. United States Postal Serv.*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062, XII-185 (1992). After the 1991 CRA, these remedies expanded to include compensatory damages, provided that the employee meet certain evidentiary burdens. *See, e.g., id.* For a detailed discussion of *Jackson*, see *infra* notes 101-104 and accompanying text.

³⁶ 29 C.F.R. §1614.107(h) (1999). If the agency does not offer relief, the employee may request a hearing before an EEOC administrative judge, or receive a final agency decision. 29 C.F.R. §1614.108(f) (1999). If the employee opts for a hearing before an administrative judge (AJ), the AJ must conduct a hearing and issue findings of fact and conclusions of law, including appropriate relief if discrimination exists. 29 C.F.R. §1614.109(g) (1999). The employing agency then has 60 days to reject or modify those findings and issue its own final decision. *Id.*

³⁷ 29 C.F.R. §1614.401(a) (1999); 42 U.S.C. § 2000e-16(c) (1999).

³⁸ 29 C.F.R. §1614.405 (1999). If this decision includes a finding of discrimination, it must also

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employee remains dissatisfied, he may appeal the EEOC decision in federal court.³⁹ However, regardless of when an employee decides to invoke the powers of the federal courts, he must always have exhausted his administrative remedies before doing so.⁴⁰

C. Disagreement in the Circuits

Prior to *West v. Gibson*, two federal cases addressed the issue of whether the EEOC may award compensatory damages in the administrative process: *Fitzgerald v. Secretary, Dept. of Veterans Affairs*⁴¹ and *Crawford v. Babbitt*.⁴² These two cases reached opposite results, yet both courts based their opinions on the language of both Title VII and the damages provisions of the 1991 CRA.⁴³

In *Fitzgerald*, the Court of Appeals for the Fifth Circuit construed this language broadly, considering Congress' intent and the purpose of both statutes, and hinging its analysis on the provision of Title VII that allows the EEOC to have broad power to fashion appropriate remedies that are not limited to backpay and reinstatement.⁴⁴ The *Fitzgerald* court also pointed out that allowing the EEOC to award compensatory damages is consistent with EEOC precedent and procedures, which deserve a great deal of deference.⁴⁵

However in *Crawford*, the Court of Appeals for the Eleventh Circuit analyzed

include appropriate remedies. *Id.* In addition, the employing agency may not appeal an EEOC decision to federal court, thus making the EEOC decision binding on the employing agency. 29 C.F.R. §1614.504 (1999).

³⁹ 29 C.F.R. § 1614.408 (1999); *see also* 42 U.S.C. § 2000e-16(c) (1999).

⁴⁰ *See, e.g.,* *McCarthy v. Madigan*, 503 U.S. 140 (1992). In *McCarthy*, the Court explored the purposes and policies of the exhaustion requirement: “[e]xhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *Id.* at 145. Protecting agency authority is “grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer.” *Id.*

⁴¹ 121 F.3d 203 (5th Cir. 1997).

⁴² 148 F.3d 1318 (11th Cir. 1998).

⁴³ *Fitzgerald v. Secretary, U.S. Dept of Veterans Affairs*, 121 F.3d at 203, 207 (5th Cir. 1997); *Crawford v. Babbitt*, 148 F.3d 1318, 1324 (11th Cir. 1998).

⁴⁴ *Fitzgerald*, 121 F. 3d at 207 (citing 42 U.S.C. § 2000e-16(b) and stating that “[g]iven that the purpose of Title VII is to make injured claimants whole . . . , we do not believe that Congress would have created an administrative process capable of providing only partial relief.”).

⁴⁵ *Id.* at 207-208 (“We afford considerable weight and deference to an agency's interpretation of a statute it administers if Congress has not spoken directly to the precise question at issue.”)

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the relationship between the language of the statutes and sovereign immunity, focusing primarily on the requirements for waiving sovereign immunity.⁴⁶ In construing the statutory language narrowly, the court determined that the jury trial provision of the 1991 CRA places a necessary condition on awarding discriminatees compensatory damages against a federal agency: “the agency may not be held liable for compensatory damages unless it has the opportunity to have a jury trial on the issue of its liability for those compensatory damages.”⁴⁷ Since the EEOC’s administrative process prevents an agency from obtaining a jury trial--the only way for a complainant to receive compensatory damages--the EEOC may not award such damages in that process.⁴⁸ The Supreme Court granted certiorari in *West v. Gibson* to resolve the conflict between *Fitzgerald* and *Crawford*.⁴⁹

III. STATEMENT OF THE CASE

A. *Statement of Facts*

Michael Gibson began his civilian career with the federal government in 1988, when he took a position as a GS-9 accountant⁵⁰ with the Department of Veterans

⁴⁶ *Crawford*, 148 F.3d at 1323-24. The *Crawford* court states the “rules” for waiving sovereign immunity: 1. the government’s consent to be sued must be express, not implied; and 2. the scope of this consent must be strictly construed in favor of the sovereign. *Id.* at 1324 (citing *United States v. Mitchell*, 445 U.S. 535 (1980) and *Lane v. Pena*, 518 U.S. 187 (1996)). The dissenting Supreme Court justices in *West v. Gibson* also base their opinion on the issue of sovereign immunity. 119 S. Ct. 1906, 1913-15. See *infra* notes 90-94 and accompanying text for a discussion of the dissenting opinion.

⁴⁷ *Crawford*, 148 F.3d at 1324. The court’s line of reasoning is as follows: it first recognizes that the 1972 amendments to Title VII, which extended the Act to federal government employees, amounted to the government’s waiver of its sovereign immunity in the employment discrimination context. *Id.* The court then states that the Civil Rights Act of 1991 is an expansion of this waiver because it allows compensatory damage awards against the government. *Id.* Thus, the jury trial provision must be read as a necessary limitation on the expansion of the government’s waiver of its sovereign immunity in the Title VII context. *Id.*

⁴⁸ *Id.* The *Crawford* court also states that unless Congress provides otherwise, a waiver of sovereign immunity may not be extended to make federal agencies liable for compensatory damages as a result of the administrative process. *Crawford*, 148 F.3d at 1324-25. Interestingly, the court cites the Seventh Circuit Court of Appeals decision in *Gibson v. Brown* for this proposition. *Id.* See *infra* notes 72-75 and accompanying text for a discussion of this decision.

⁴⁹ 119 S. Ct. 863 (1999). See *infra* notes 76-94 and accompanying text for a discussion of the Supreme Court opinion in *West v. Gibson*.

⁵⁰ “GS-9” denotes Gibson’s General Schedule pay rate, which is a pay scale used for all white-

Affairs (VA)⁵¹ in Albuquerque, New Mexico.⁵² In 1990, Gibson transferred to the VA supply depot in Hines, Illinois, where the events giving rise to his cause of action took place.⁵³ In 1992, Gibson applied for a promotion to the position of Supervisory Accountant, which was a GS-11/12 position.⁵⁴ However, his two female supervisors turned him down, opting instead to hire another female.⁵⁵ According to Gibson, the job posting was “reissued and given to an employee who did not qualify” for it.⁵⁶

B. Procedural History

Gibson filed a timely complaint with the VA, alleging gender discrimination and

collar federal employees. Dennis V. Damp, *supra* note 29. General Schedule pay starts at GS-1, which is a pay rate of \$13,362 annually, and goes up to GS-15, which is \$97,201 annually. *Government Employment: Pay and Benefits*, (last modified Dec. 30, 1999) <<http://www.federaljobs.net/overview.htm#PAY & BENEFITS>>. These pay rates are adjusted for areas that have a higher cost of living. *Id.* Each pay grade has ten steps therein, which represent increases in pay and which federal employees earn based on performance and time in service. *Id.* For 2000, GS-9 pay starts at \$32,380 per year; GS-11 starts at \$39,178 per year; and GS-12 starts at \$46,955 per year. *General Schedule Pay* (visited Jan. 12, 2000) <<http://www.usajobs.opm.gov/b5a.htm>>. The federal government also uses Qualification Standards, which work in conjunction with the General Schedule pay system, to determine what jobs fit applicants' skills, and based on those skills, the appropriate starting pay grade for that applicant. *Qualification Standards: Federal Occupations (GS-0000 through 2199)* (last modified Dec. 30, 1999) <<http://www.federaljobs.net/quals2.htm#INDEX>>. Pay grades are based on education and experience related to the job; for example, an applicant seeking a position in the GS 007 series, which is the Correctional Officer series, must have a bachelor's degree to qualify for a GS-4 position. *Id.*

⁵¹ The Department of Veterans Affairs was established on March 15, 1989, and became the fourteenth department in the President's cabinet. *Department of Veterans Affairs (VA): Overview* (visited Jan. 12, 2000) <<http://www.va.gov/organization/vavdva.htm>>. The Department of Veterans Affairs replaced the Veterans Administration, which was created in 1930. *Id.* The agency's mission is to provide benefits and services to veterans and their dependents. *Id.*

⁵² *Gibson v. Brown*, 137 F.3d 992, 993 (7th Cir. 1998), *vacated sub nom.* *West v. Gibson*, 527 U.S. 119 S. Ct. 1906 (1999).

⁵³ *Id.*

⁵⁴ *Gibson v. Brown*, 1996 WL 568780 at *1, (N.D. Ill. Oct. 3, 1996), *rev'd*, 137 F.3d 992 (7th Cir. 1998), *vacated sub nom.* *West v. Gibson*, 527 U.S. 119 S. Ct. 1906 (1999). GS-11/12 pay is discussed *supra* note 50.

⁵⁵ *Gibson*, 137 F.3d at 993.

⁵⁶ *Gibson*, 1996 WL 568780 at *1. Gibson alleged that his two female supervisors passed him over, in favor of another woman who had far less experience than did Gibson. *Respondent's Brief*, 1999 WL 167061, at *2 (U.S. Resp. Brief Mar. 25, 1999).

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asking for relief in the form of backpay⁵⁷ and a transfer to a different hospital of his choice.⁵⁸ The VA investigated the complaint⁵⁹ and found no discrimination.⁶⁰ Gibson appealed to the EEOC, which reversed the VA decision and found discrimination based on Gibson's gender.⁶¹ On November 6, 1995, the EEOC ordered the VA to promote Gibson to the Supervisory Accountant position within 30 days and to pay him backpay and interest within 60 days after the EEOC's decision became final.⁶² The VA did not promote Gibson until December 23, 1995, which exceeded the 30-day requirement.⁶³ In addition, the VA did not pay Gibson his backpay until February 22nd and 24th of 1996.⁶⁴

In the meantime, Gibson filed suit in the District Court for the Northern District of Illinois,⁶⁵ seeking enforcement of the EEOC's decision with which the VA had not yet complied.⁶⁶ Gibson added additional remedies to his complaint: front pay,⁶⁷ a declaration of his right to transfer to another facility, a jury trial as to compensatory

⁵⁷ Backpay for government employees is computed "for the period covered by the corrective action" and includes "the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred." 5 C.F.R. § 550.805(a) (1999).

⁵⁸ *Gibson*, 1996 WL 568780 at *1. Gibson asked for backpay at a GS-11 rate, which is the rate he would have made had he received the promotion. *Id.* GS-11 pay is described *supra*, note 50.

⁵⁹ *See supra* notes 29-40 and accompanying text for a discussion of the process federal employees must follow to pursue a discrimination claim against a government agency. The VA made this finding in July of 1993, approximately one year after Gibson filed his initial complaint. *Gibson*, 137 F.3d at 993.

⁶⁰ *Id.*

⁶¹ *Id.* This finding was made on October 6, 1995, a full two years after Gibson filed the initial complaint with the VA. *Gibson*, 1996 WL 568780 at *1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Gibson filed his suit on January 11, 1996, which is after he received the promotion, but before the VA paid him his backpay award. *Id.*

⁶⁶ *Gibson*, 137 F.3d at 994.

⁶⁷ Front pay is an equitable remedy designed to compensate a complainant for lost future wages and benefits, and is generally appropriate when reinstatement is not feasible. Edward T. Ellis & Paula Zimmerman, *Current Developments in Employment Law: Retaliation Claims*, SE05 ALI-ABA 295, 312-13 (1999). *See also* Alan R. Kabat & Debra S. Katz, *Racial and Sexual Harassment Employment Law*, SE05 ALI-ABA 547, 617-18 (1999).

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damages, and attorney fees incurred after October 6, 1995.⁶⁸ While the suit was pending, the VA voluntarily complied with the EEOC's initial order, leaving Gibson's claim for compensatory damages as the only remaining issue in the case.⁶⁹

On the issue of compensatory damages, the District Court granted summary judgment in favor of the VA on the theory that Gibson raised new claims in his complaint, meaning that he did not exhaust administrative remedies⁷⁰ with respect to these claims, and thus could not bring them in federal court.⁷¹ The Court of Appeals for the Seventh Circuit reversed the District Court, first concluding that Gibson's claim for compensatory damages was not a new claim, but rather a claim for damages arising from the initial claim against the VA.⁷² The Court of Appeals then considered whether Gibson failed to exhaust his administrative remedies, focusing on whether the EEOC has the power to award compensatory damages, since a complainant cannot exhaust agency remedies if the agency does not have the power to award the relief requested.⁷³

The Court of Appeals, ruling in favor of Gibson, concluded that the EEOC does not have the power to award compensatory damages in the administrative process, thus entitling Gibson to pursue those remedies in federal court.⁷⁴ The VA appealed the

⁶⁸ *Gibson*, 1996 WL 568780, at *1. 42 U.S.C. §1988 allows prevailing civil rights complainants to collect attorney fees: "In any action or proceeding to enforce a provision of sections 1981, 1981a, . . . [and] Title VII of the Civil Rights Act of 1964 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . ." 42 U.S.C. §1988(b) (1995). The prevailing party, at the court's discretion, may also collect expert fees as part of the attorney fee. *Id.* §1988(c).

⁶⁹ *Gibson*, 137 F.3d at 994.

⁷⁰ Generally, a failure to exhaust administrative remedies precludes a complainant from pursuing a claim in federal court. *Gibson*, 137 F.3d at 995. The exhaustion doctrine is discussed *supra* note 40. See *supra* notes 29-40 and accompanying text for a discussion of the EEOC process for federal employees.

⁷¹ *Gibson*, 1996 WL 568780, at *4. The District Court essentially ruled on the pleadings since the VA filed a motion to dismiss Gibson's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim for relief. *Id.* at *1. The District Court granted the VA's motion on the grounds of jurisdiction, rejecting Gibson's claims that federal jurisdiction was proper either under the Federal Tort Claims Act or under 28 U.S.C. §§1331 and 1346. *Id.* at *3. However, the District Court decided it could consider Gibson's substantive claims based on jurisdiction under §717 of Title VII. *Id.* The District Court also granted the VA's motion as to Gibson's claims for front pay and a transfer, but granted summary judgment in favor of Gibson on the issue of attorney fees, since he would never have incurred those fees had the VA responded promptly to the EEOC's initial order. *Id.* at *6-*7.

⁷² *Gibson*, 137 F.3d at 994.

⁷³ *Id.* at 994-95 (citing *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992)).

⁷⁴ *Id.* at 998. The Court of Appeals analysis focuses on the language of §1981a and how this

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decision to the United States Supreme Court, which granted certiorari to resolve the issue of whether the EEOC has the power to award compensatory damages.⁷⁵

C. U.S. Supreme Court Decision

1. Majority Reasoning

The Supreme Court, in a 5-4 decision written by Justice Breyer, vacated the Seventh Circuit's decision and remanded the case for further proceedings to decide whether Gibson actually notified the EEOC that he was seeking compensatory damages.⁷⁶ In reaching this conclusion, the Court examined the legislative history of the Civil Rights Act of 1991, citing the purposes of those amendments and their relationship to the enforcement of Title VII.⁷⁷ The Court found that the legislative history, combined with the language and purposes of the Act, is consistent with a grant of authority to the EEOC to award compensatory damages.⁷⁸ In parsing the language

language is too ambiguous to allow the EEOC to award compensatory damages. *See id.* at 996-98. For instance, the Court of Appeals discussed the jury trial provisions in §1981a(c) and the use of the word “action” (as opposed to “proceeding”) in §1981a(a)(1) to demonstrate Congress' lack of intent to extend such broad powers to the EEOC. *Id.* at 996-97. The Court's strict construction is based on notions of sovereign immunity and Congress' ability to legislate suits for money damages against the federal government. *Id.* at 997. *See infra* notes 90-93 and accompanying text for more discussion of sovereign immunity, as raised by the dissenting opinion in the Supreme Court opinion.

⁷⁵ West v. Gibson, 119 S. Ct. 863 (1999) (granting certiorari to hear the case); *see also* West v. Gibson, 119 S. Ct. at 1909 (stating the issue of the case).

⁷⁶ West v. Gibson, 119 S. Ct. at 1912-13. The Government's petition for *certiorari* did not include the factual issue of whether Gibson did indeed exhaust his administrative remedies, which precluded the Supreme Court from considering that issue. *Id.* In his brief, Gibson argues that the Supreme Court should affirm the Court of Appeals decision on the alternate grounds that Gibson did indeed exhaust his administrative remedies: “Mike Gibson exercised his rights, followed all the rules, complied fully with EEOC rules, regulations, and instructions. After receiving less than full relief, Gibson properly pursued his claim in federal court. The EEOC cannot now argue that Gibson failed to use magic words and is barred from filing suit in federal court.” Respondent's Brief, 1999 WL 167061, at *30, West v. Gibson (No. 98-238). The Government responds to this argument in its reply brief, contending that the factual issue of Gibson's exhaustion is not properly before the Supreme Court because it is not part of the issue on which the Court granted *certiorari*. Petitioner's Reply Brief, 1999 WL 203478, at *13, West v. Gibson (No. 98-238).

⁷⁷ 119 S. Ct. at 1908-09.

⁷⁸ *Id.* at 1910-12.

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of the Act, the majority focused first on section 717(b) of Title VII,⁷⁹ which allows the EEOC to enforce the provisions of Title VII “through appropriate remedies, including reinstatement . . . with or without backpay.”⁸⁰ The Court reasoned that the “appropriate remedies” language preceding the enumeration of specific remedies indicates that the EEOC’s authority is not limited to equitable remedies.⁸¹

The majority also addressed Gibson’s argument that the use of the word “action” in the context of when compensatory damages may be awarded should be construed narrowly to contemplate only judicial cases, not administrative proceedings.⁸² The Court counters this argument by pointing out that Congress could have used other devices to preclude the EEOC from awarding compensatory damages.⁸³ The majority then dismissed this argument by concluding that, in light of the purposes and history of Title VII, the simple use of the word “action” could not possibly be construed to deny the EEOC’s authority to award damages.⁸⁴ In this same vein, the majority dismisses Gibson’s argument based on the jury trial provision in the 1991 CRA.⁸⁵

⁷⁹ Section 717(b) is codified at 42 U.S.C. § 2000e-16(b).

⁸⁰ 119 S. Ct. at 1910 (quoting 42 U.S.C. § 2000e-16(b)).

⁸¹ *Id.* The Court supported this premise by stating that the purpose of Title VII’s remedial scheme, to remedy discrimination in federal employment, would be undermined if the EEOC could not award federal employees the full panoply of remedies available under the statute. *Id.* The Court also posited that withholding this authority from the EEOC would create an awkward and expensive system in which federal employees would have to go to federal court to be fully compensated. *Id.*

⁸² *Id.* at 1911. The statutory provision in question here provides that:

In an *action* brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination (not . . . disparate impact) . . . may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. §1981a(a)(1) (1999) (emphasis added).

⁸³ *See Gibson*, 119 S. Ct. at 1911. The Court reasons that, if Congress intended to prevent the EEOC from awarding compensatory damages, it could have drafted §1981a(a)(1) in such a way as to restrict its application to exclude the provisions regarding federal sector employment discrimination claims. *Id.*

⁸⁴ *Id.* But see *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 60-62 (1980) (concluding that “action” refers to “court actions,” and “proceedings” refers generally to state, local, or administrative charges.). Gibson uses *Carey* to argue that the ordinary meaning of the words “action” and “proceeding” in the context of the statutes indicates that Congress authorized compensatory damage awards in civil actions, not in administrative proceedings. *See Respondent’s Brief*, 1999 WL 167061, at *13 and n.1, *West v. Gibson* (No. 98-238).

⁸⁵ *Gibson*, 119 S. Ct. at 1912. The jury trial provision is codified in 42 U.S.C. §1981a(c) (1999).

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Gibson's final argument centers on a point that is the focus of the dissenting opinion:⁸⁶ waiver of the Government's sovereign immunity.⁸⁷ Gibson argues that requiring the government to pay compensatory damage awards waives the government's sovereign immunity, thereby requiring a narrow construction of Title VII's damages provisions.⁸⁸ The majority disagrees with this argument, concluding that the government's waiver of its sovereign immunity is adequately expressed in the "statutory language, taken together with statutory purposes, history and the absence of any convincing reason for denying the EEOC the relevant power."⁸⁹

2. Dissent Reasoning

The dissenting opinion, written by Justice Kennedy, objects to the majority's analysis of the sovereign immunity issue, and thus would construe the compensatory damages provisions narrowly to preclude the EEOC from awarding these damages in the administrative process.⁹⁰ The dissent reasons that a narrow construction of the Title VII damages provisions is necessary in light of the requirement for clear and unambiguous language in order for a statute to waive the government's sovereign immunity from suits for money damages.⁹¹ With this requirement in mind, the dissent

See supra note 28 for the pertinent language of this provision. Gibson's argument tracks the Court of Appeals decision, *supra* notes 72-74 and accompanying text, by citing the jury trial provision as a necessary limitation on the government's waiver of sovereign immunity. Respondent's Brief, 1999 WL 167061, at *16-*17, *West v. Gibson* (No. 98-238). Gibson contends that, by enacting the jury trial provision, "Congress clearly and unambiguously limited its waiver of immunity from such awards to civil actions in federal district court." *Id.* at *17.

⁸⁶ The dissenting opinion is discussed *infra* notes 90-94 and accompanying text.

⁸⁷ *Gibson*, 119 S. Ct. at 1912.

⁸⁸ *Id.* *See supra* notes 46-48 and accompanying text for the sovereign immunity argument the Court of Appeals made in *Crawford v. Babbitt*.

⁸⁹ *Gibson*, 119 S. Ct. at 1912. In this portion of the opinion, Justice Breyer distinguishes between the questions of waiver with respect to compensatory damage awards in general, and of the administration of those awards in light of the waiver. *See id.* Justice Breyer declines to resolve the issue of whether the strict standards that apply to governmental waiver (i.e., strict construction and unequivocal language, discussed *infra* note 91) apply to the administration question. *See id.* According to Justice Breyer, even if the stricter standard applies, it is met here by virtue of the language, purposes, and history of the statute. *Id.*

⁹⁰ *See id.* at 1913-15 (Kennedy, J. dissenting, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas).

⁹¹ *Id.* at 1913. The dissent cites to *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 119 S. Ct. 687 (1999), to support its sovereign immunity argument. *Id.* Generally, a waiver of sovereign immunity must be expressed unequivocally in a given statute, and cannot be

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refutes the majority's analysis of the language of the statute, concluding that it does not clearly and unequivocally grant the EEOC authority to award compensatory damages.⁹²

The dissent also rejects the majority's reliance on the legislative history and other "extra-textual sources" as being misplaced, as this reliance contradicts long-held precedent requiring the courts to look only to the text of a statute to find a waiver of sovereign immunity.⁹³ Lastly, the dissent cites the policy behind sovereign immunity--to protect the "public fisc"--and reasons that it is not at all clear that empowering one government agency to award government funds to fellow employees in another agency would serve that purpose.⁹⁴

IV. ANALYSIS

By holding that the EEOC can indeed award compensatory damages as part of the administrative process, the Supreme Court ratifies the EEOC's already existing paradigm for assessing and awarding such damages.⁹⁵ The problem with the Court's decision is that it essentially endorses an administrative scheme that is fraught with contradictions and difficulties for Title VII complainants.⁹⁶ The 1991 CRA itself also poses difficulties for complainants seeking full compensation for injuries resulting from intentional discriminatory conduct. By virtue of congressional compromise,⁹⁷ the amount of damages any one complainant may receive is capped according to the size of

implied from the language therein. *Id.* at 691. If a statute does indeed contain a waiver, the scope of the waiver must be narrowly construed in favor of the sovereign. *Id.*

⁹² *Gibson*, 119 S. Ct. at 1915. The dissent contests the majority's construction of "appropriate remedies," reasoning that it is not obvious that this phrase should be read as expansively as the majority posits. *See id.* at 1913. The dissent also makes much of the fact that §1981a does not specifically refer to the EEOC, "much less empower it to award or authorize money damages." *Id.* at 1914.

⁹³ *Id.* at 1915.

⁹⁴ *Id.* at 1914-15.

⁹⁵ *See infra* notes 101-113 and accompanying text for a discussion of the EEOC precedents that shape this paradigm. The majority opinion in *Gibson* mentions the EEOC scheme briefly in a discussion of the 1991 CRA: "[o]nce the [Act] became law, the EEOC began to grant compensatory damages awards in Federal Government employment discrimination cases." *Gibson*, 119 S.Ct. at 1909. To support this proposition, the majority cites to *Jackson v. United States Postal Serv.*, E.E.O.C. App. No. 01923399, 93 F.E.O.R. 3062 (1992), which is the seminal case in tracking EEOC policy and procedure. *Id.* *Jackson* is discussed more in depth *infra* note 101-104 and accompanying text.

⁹⁶ *See infra* notes 114-124 and accompanying text for a discussion of the problems with the EEOC system.

⁹⁷ *See supra* notes 14-28 and accompanying text for a discussion of the background of the 1991 CRA.

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her employer.⁹⁸ Thus, the Supreme Court's decision in *West v. Gibson* does little more than highlight the limitations and deficiencies inherent in both the 1991 CRA itself and in the EEOC system for processing federal sector discrimination complaints.⁹⁹

A. *The EEOC Scheme for Addressing Compensatory Damage Claims*

The EEOC defines compensatory damages as including “damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm).”¹⁰⁰ In *Jackson v. United States Postal Service*,¹⁰¹ the EEOC held for the first time that compensatory damages were available in the administrative process.¹⁰² The EEOC held that, since the complainant had asked for medical expenses in his initial complaint, the Postal Service should have addressed that claim by requiring objective evidence¹⁰³ to show first that the he incurred compensatory damages, and

⁹⁸ See *infra* notes 125-130 and accompanying text for a discussion of the statutory caps.

⁹⁹ The EEOC process for federal employees is discussed *supra* notes 29-40 and accompanying text. For a critical analysis of value of the EEOC in addressing employment discrimination claims, see Michael Selmi, *supra* note 2. Selmi posits that the passage of the 1991 CRA makes the EEOC ripe for reassessment because the amendments “make employment discrimination cases more attractive to private attorneys.” *Id.* at 3. Selmi concludes that the agency is generally a failure and should either be eliminated or substantially reformed. See *id.* at 57-64.

¹⁰⁰ EEOC Decision No. 915.002, *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991*, 1992 WL 189089 at *4 (E.E.O.C. July 14, 1992). Examples of pecuniary loss are medical expenses, including psychiatric expenses, moving expenses, and job search expenses. *Id.* Future pecuniary losses are those losses that are likely to occur after the conclusion of the litigation. *Id.* In contrast, nonpecuniary loss includes a host of intangible, but compensable, injuries such as pain and suffering, inconvenience, injury to professional standing, injury to character, and loss of enjoyment of life. *Id.* at *5.

¹⁰¹ E.E.O.C. Appeal No. 01923399, 93 F.E.O.R. 3062 (1992). In this case, a Postal Service employee filed a complaint alleging discrimination based on sex, race, age, physical handicap, and reprisal. *Id.* at XII-185. The agency offered Mr. Jackson an offer of full relief, which did not address the medical expenses he incurred as a result of these events. *Id.* The agency then canceled Mr. Jackson's complaint for failure to accept the offer; Mr. Jackson appealed the agency's decision to the EEOC. *Id.*

¹⁰² *Id.* at XII-186. The EEOC analyzed the language of the 1991 CRA and concluded that both the language and the purpose of the Act indicate that such damages are clearly available in the administrative process. *Id.* at XII 186-87.

¹⁰³ The EEOC evidently adopted the “objective evidence” standard in this case because Jackson asked for reimbursement of medical expenses; he did not claim any nonpecuniary loss that is more difficult to assess because of the intangible nature of such loss. Staudmeister, *supra* note 24, at 208.

second that those damages were causally linked to the discrimination.¹⁰⁴

EEOC cases after *Jackson* modified and refined agency standards for addressing both pecuniary and nonpecuniary losses. In *Carle v. Department of the Navy*,¹⁰⁵ the EEOC faced a claim for emotional distress, which could not be readily proved by “objective evidence.”¹⁰⁶ Although the *Jackson* two-part inquiry still applied, the EEOC addressed the intangible nature of the emotional distress claim by requiring agencies to consider objective and “other evidence” to evaluate a damages claim.¹⁰⁷ After establishing the types of evidence that are appropriate, the EEOC dealt with issues relating to burden of proof and determining the reasonableness of a nonpecuniary damage award. Once a complainant makes a *prima facie* showing of damages,¹⁰⁸ the burden shifts to the agency to refute the claim.¹⁰⁹ However, even if a complainant makes the minimum showing, the actual award must be limited to the sum necessary to reimburse her for actual losses, whether tangible or not, caused by the discriminatory conduct.¹¹⁰ Generally, a compensatory damage award is proper if it is not “monstrously excessive standing alone,” and if it is “consistent with similar awards made in similar cases.”¹¹¹ To determine consistency with other cases, the EEOC looks

¹⁰⁴ *Jackson*, 93 F.E.O.R. 3062 at XII-185. The EEOC vacated the agency's dismissal and remanded the case for further processing. *Id.* at XII-187.

¹⁰⁵ E.E.O.C. Appeal No. 01922369, 94 F.E.O.R. 1043 (1993).

¹⁰⁶ Objective evidence includes receipts and bills from visits to the doctor, transportation to the hospital, etc. *Carle*, 93 F.E.O.R. at XI-50.

¹⁰⁷ *Id.* “Other evidence,” as contrasted with objective evidence, could include “a statement by appellant describing her emotional distress, and statements from witnesses, both on and off the job, describing the distress.” *Id.*

¹⁰⁸ Making a *prima facie* showing of damages involves alleging damages in the complaint, demonstrating the link between the alleged discrimination and those damages, and submitting evidence relating to the damages. See *Mims v. Department of the Navy*, E.E.O.C. Appeal No. 01933956, 94 F.E.O.R. 3153 (1993). In *Mims*, the complainant asked for \$300,000 for pain and suffering and, upon the agency's request, submitted medical documentation relating to her hospitalization. *Id.* at XII-19. The agency's offer of full relief awarded complainant \$500 with no substantiation or justification for this figure. *Id.*

¹⁰⁹ *Id.* at XII-20. Generally, to avoid reversal under this standard, the agency must set forth the specific grounds on which it determines the amount of a compensatory damages award; it is not enough for the agency to reject claims without substantiation. Staudmeister, *supra* note 24, at 210.

¹¹⁰ *Rountree v. Dept. of Agric.*, 1995 WL 413533, at *7 (E.E.O.C. July 7, 1995). In this case, the complainant asked for a total of \$937,725 in compensatory damages for a host of pecuniary and nonpecuniary losses relating to a poor job performance review. *Id.* at *2-5. The agency decision found discrimination, but denied complainant's request for damages based on a lack of causation. *Id.* at *5.

¹¹¹ *Carpenter v. Dept. of Agric.*, 1995 WL 434072, at *9 (E.E.O.C. July 17, 1995) quoting

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to federal cases involving either bench or jury trials to determine a range of dollar values that other courts have awarded for the type of damages alleged.¹¹² The EEOC then considers the nature and severity of the complainant's harm, as well as the duration or the anticipated duration of this harm, to award a reasonable dollar value within the determined range.¹¹³

B. How the EEOC System May Preclude Actual or Adequate Recovery of Compensatory Damages

1. Procedural and Evidentiary Difficulties

The EEOC process is a very complicated one for an average discrimination complainant, since these complainants often negotiate the system without counsel.¹¹⁴ For example, the EEOC has placed limitations on when a complainant may ask for compensatory damages, how a complainant must ask for these damages, and what sort of evidence a complainant must adduce to prove these damages.¹¹⁵ These limitations may thwart *pro se* complainants and may even preclude them from recovering at all, or at least from recovering compensatory damages.¹¹⁶

Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989). In this case, the EEOC held that awarding the complainant half of the amount he had asked for “properly compensates [complainant] for his emotional distress damages, based on the long pattern of agency actions that resulted in causing [complainant] further harm, and that such an award is not excessive standing alone.” *Id.*

¹¹² *E.g., Rountree*, 1995 WL 413533, at *9. The EEOC reversed the agency in part, finding that some of complainant’s injuries were indeed caused by the agency’s conduct. *Id.* at *7. In deciding to award the complainant in this case damages for his emotional distress, the EEOC examined recent court and jury awards to arrive at a range of \$500 to \$100,000. *Id.*

¹¹³ *Id.* at *9. After determining the \$500 to \$100,000 range, the EEOC decided, without any real explanation, that an award of \$8,000 in compensatory damages would be reasonable for this particular complainant. *See id.* at *10.

¹¹⁴ Interestingly, this issue was addressed at oral argument:

QUESTION: Is it true that most of these people at the agency level are not represented by counsel?

MS. McDOWELL: I believe that's correct, Your Honor, at least a large number of them are not.

Oral Argument of Barbara B. McDowell, Esq., on Behalf of the Petitioner, 1999 WL 270048, at *8 (U.S. Oral Arg. April 25, 1999). *See also Selmi*, *supra* note 2, at 43.

¹¹⁵ *See generally Staudmeister*, *supra* note 24, at 220-250.

¹¹⁶ *See, e.g., Roberson v. Dept. of Veterans Affairs*, E.E.O.C. Appeal No. 01940467, 94 F.E.O.R. 3325 (1994) (affirming the agency's dismissal of the complaint, and thus precluding the complainant from recovering any damages, because the complainant refused the agency's offer of full relief).

Generally, a complainant may raise a claim for compensatory damages at any point during the process up until the EEOC renders its initial decision; however, a complainant may not raise a compensatory damage claim in a request for the EEOC to reconsider its decision.¹¹⁷ This may thwart a *pro se* complainant who fails to request compensatory damages until that phase of the process.

To assert a proper claim for compensatory damages, a complainant “need not use legal terms of art such as ‘compensatory damages,’ but merely must use some words or phrases to put the agency on notice that . . . a nonpecuniary loss has been incurred.”¹¹⁸ However, the EEOC has not applied this standard consistently, which may confound complainants who do not have the assistance of counsel while drafting their complaints.¹¹⁹ In one case, even though the complainant did not make an affirmative claim for compensatory damages, the EEOC reversed the employing agency's adverse decision and remanded the complaint to the agency for consideration of compensatory damages.¹²⁰ Yet in another case where there was no affirmative request for compensatory damages, the EEOC upheld the agency's dismissal of the complaint for complainant's failure to accept an offer of full relief.¹²¹

Even though a complainant may raise a claim for compensatory damages on time and in the appropriate terms, she may not be able to adduce appropriate evidence to demonstrate her damages. In some instances, it is not clear whether a complainant's testimony alone is enough, or whether the complainant must also present testimony

¹¹⁷ *E.g.*, *Berendsen v. Dept. of Agric.*, 1996 WL 106929, at *5 (E.E.O.C. March 1, 1996). There is a narrow exception to this general rule whereby a new claim for compensatory damages is proper at this phase if the prior decision is remanded for further processing because of another deficiency. *Staudmeister*, *supra* note 24, at 229-30 and n.309 (citing *Square v. Dept. of Veterans Affairs*, E.E.O.C. Appeal No. 05930910 (1994)).

¹¹⁸ *Fiandaca v. Dept. of the Navy*, 1995 WL 577063, at *8 n.3 (E.E.O.C. Sept. 21, 1995) (internal citation omitted).

¹¹⁹ *See infra* notes 120-124 and accompanying text for an analysis of cases in which the EEOC has applied its own standards inconsistently.

¹²⁰ *Fiandaca*, *supra* note 118, at *5. The EEOC held that the complainant “alluded to a claim for compensatory damages throughout the processing of the case” because she alleged that she suffered mental anguish and a nervous breakdown as a result of sexual harassment. *Id.* at *2.

¹²¹ *Roberson*, 94 F.E.O.R. 3325, at XII-457. In her complaint, the complainant alleged that she was hurt emotionally by derogatory comments from her supervisor. *Id.* In addressing this allegation, the EEOC stated that “[t]his allegation, without a specific claim for damages, is insufficient to put the agency on notice that a claim for compensatory damages has been raised.” *Id.* at XII-458. It is not clear how this claim is less sufficient to put the agency on notice than Ms. Fiandaca's claim, discussed *supra* note 120.

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from other witnesses and medical records.¹²² Although medical records can be useful to corroborate statements and testimony, submitting these records to the employing agency can be problematic. For example, the EEOC requires that medical records not only cite the complainant's injuries, but also state that the agency's conduct actually inflicted the harm.¹²³ Another problem with submitting medical records is the question of privacy. The EEOC has held that, since a complainant places her medical condition in issue by requesting damages for emotional damages and medical expenses, the complainant is not entitled to any privilege and the employing agency may examine medical records even without the complainant's consent.¹²⁴

2. Statutory Caps on Damages

Assuming that a *pro se* complainant can navigate the EEOC system successfully, there is still an ultimate limitation on her recovery: statutory caps on compensatory damages.¹²⁵ These caps are the result of a compromise between proponents of tort reform¹²⁶ and those who reject such limitations, especially in the context of intentional conduct.¹²⁷ From the perspective of an employment

¹²² See *Carpenter*, 1995 WL 434072, at *4. See also EEOC Decision No. 915.002, *supra* note 100, at *6 (“Plaintiff’s own testimony may be solely sufficient to establish humiliation or mental distress.”)(internal citation omitted). But see *id.* at *8 (“A medical release should be obtained from the complaining party whenever emotional or physical harm is alleged.”).

¹²³ E.g., *Browne v. Dept. of Agric.*, 1995 WL 434086, at *6 (E.E.O.C. July 17, 1995) (“Moreover, we further find that the [complainant’s] medical evidence did not provide the requisite proof of a connection between the agency’s action and the [complainant’s] loss of health.”).

¹²⁴ *Carpenter*, 1995 WL 434072, at *15 n.2.

¹²⁵ See *supra* notes 14-28 and accompanying text for more background on passage of the 1991 CRA and its damages provisions. The damages caps provisions are cited *supra* note 27.

¹²⁶ In the 1980s, most states enacted legislation limiting a jury’s ability to award large damage amounts in tort cases. See *Roskiewicz*, *supra* note 15, at 410. The policy behind this legislation included limiting liability of potential tortfeasors, whose funds would be depleted by these large awards. *Id.* The most compelling counterargument to this policy is that statutory caps on damages allow intentional tortfeasors to use a cost-benefit analysis to determine how and when to act, knowing that a certain amount of egregious conduct is “allowed” from a cost standpoint. *Cf. id.* In Ohio, caps on the amount of punitive damages a jury could award have been struck down as a violation of the Ohio Constitution because, *inter alia*, these caps deprive litigants of a right to a jury trial. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091 (1999). The Ohio Supreme Court reasoned that, by capping punitive damages, the Ohio legislature substitutes its own will for that of the jury, which essentially nullifies the jury’s determination of an individual litigant’s case and deprives that litigant of her right to a trial by jury. *Id.*

¹²⁷ See *Roskiewicz*, *supra* note 15, at 393. According to *Roskiewicz*, “less than one week after

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discriminatee, especially in the federal sector, these caps represent a major obstacle to a compensatory damage award that actually makes him whole.¹²⁸ Instead, the actual damages any complainant may receive are limited based not on the agency's conduct, but rather on the size of the agency, which has no actual bearing on the degree of severity of the discriminatory conduct.¹²⁹ The result is an administrative system in which complainants who suffer the most serious injuries cannot obtain full relief, and the most reprehensible offenders are protected from full liability.¹³⁰

V. CONCLUSION

At first glance, the decision in *West v. Gibson* seems like a triumph for federal sector employment discriminatees because it arms the EEOC with a complete arsenal of remedies with which to combat employment discrimination in the federal sector. However, the decision in *West v. Gibson* is not at all advantageous to federal employees.

Just as they did before the *Gibson* decision, federal employment discriminatees will face the EEOC system largely without the assistance of counsel. And just as before, actually obtaining compensatory damages in this system will be a game of chance for federal sector complainants because the EEOC's policies and standards remain unclear and inconsistent. Instead of taking an opportunity to shake up the current system by allowing federal employees access to federal court to litigate compensatory damages claims, the Supreme Court's decision in *West v. Gibson* does nothing more than sanction the *status quo*, which is a treacherous and inconsistent administrative process based on a congressional compromise.

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President Bush signed the 1991" CRA, senators from both parties proposed bills to lift the caps. *Id.* at 393-94.

¹²⁸ In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court recognized that one of the purposes of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination." The caps do not apply to monetary relief such as back pay and medical reimbursements, but they do apply to nonpecuniary losses such as emotional suffering and loss of enjoyment of life. Richard T. Seymour, *How to Stem the Erosion: A Practical Guide to Using the Civil Rights Act of 1991*, HUM. RTS., Summer 1992 at 13.

¹²⁹ See Seymour, *supra* note 128, at 13; see also Roskiewicz, *supra* note 15, at 408 (stating that "victims of sex, religious, or disability discrimination only have an opportunity to recover an amount based on the size of the employer rather than the egregiousness of the employer's conduct.").

¹³⁰ Roskiewicz, *supra* note 15, at 409, citing Senator Kennedy's statements from the Congressional Record, 137 CONG. REC. §18,375 (daily ed. Nov. 26, 1991).